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IN THE

Supreme Court of the United States

JANUARY TERM, 1954

No. 523

REBECCA SWIDLER and SARA MILLER,

Petitioners,

against

KNOCKLONG CORP., GRESA REALTY CO. INC. and GRACE E. CONNOLLY,

Respondents.

BRIEF FOR RESPONDENT, KNOCKLONG CORP., IN OPPOSITION

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INDEX

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT:	
A. The New York Court of Appeals did not hold the deed to be conclusively valid	5
B. The partition action was effective to extinguish the outstanding right of the petitioners' predecessors to redeem	6
C. The Proceedings for Service by Publication were proper	7
1. 134 West 71st Street, New York, N. Y.	7
2. Care of Cadwalader, Wickersham & Taft	8
3. The addresses appearing in the deed recorded January 28, 1949, after the Partition Action was instituted	8
Conclusion	9

CITATIONS

Cases:

City of New York v. New York, N. H. & H. R. Co., 344 U. S. 293	7, 9
Devalan Home & Land Co., Inc. v. Erie County, 188 Misc. 299, aff'd 294 N. Y. 847	5
Grannis v. Ordean, 234 U. S. 385	7

PAGE

Keely v. Sanders, 99 U. S. 441 ..... 5, 6

League v. Texas, 184 U. S. 156 5

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 ..... 7, 9

Statutes:

New York Civil Practice Act, Section 232, 232-a and 232-b 2, 7

New York Rules of Civil Practice, Rule 50 2

Nassau County Administrative Code, Sec. 5-51.0 .... 3, 5

Nassau County Administrative Code, Sec. 5-57.1 6

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Rebecca Swidler and Sara Miller,

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against

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Respondents.

BRIEF FOR RESPONDENT, KNOCKLONG CORP., IN OPPOSITION

Jurisdiction

The petition (p. 2) sets forth the essential jurisdictional elements pursuant to 28 U. S. C. Sec. 1257(3). Although the New York Court of Appeals, in its amended remittitur, certified that in reaching a determination, it necessarily passed upon a Federal Constitutional question (P. A. pp. 40-41) we submit that such issue was incidental rather than substantial and, by reason thereof, the petition for a writ of certiorari should be denied.

Questions Presented

The petition (pp. 4-5) points to three alleged federal questions present in this case, as follows:

(1) That the New York Court of Appeals erred in holding the tax deed conclusively valid although no notice was given.

(2) That petitioners' right to redeem could not be extinguished by the partition action.

(3) That the service of process in the partition action upon petitioners' predecessors in title was invalid.

In answer to these contentions of petitioners, we submit:

(1) That the New York Court of Appeals did not hold the deed conclusively valid but, after a thorough consideration of petitioners' attack thereon, found the deed to be valid.

(2) That the right of petitioners' predecessors to redeem was effectively extinguished by the partition judgment.

(3) That jurisdiction of petitioners' predecessors in title was acquired in accordance with the provisions of Sections 232, 232-a and 232-b of the New York Civil Practice Act and Rule 50, New York Rules of Civil Practice (P. A.* pp. 19-21) and that such proceedings were not violative of the Federal Constitution.

Statement

Despite our preference for brevity, petitioners' selection of facts out of context and the false charges and character-

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* Abbreviation Used: P. A. designates Petitioners' Appendix.

izations contained in the petition require a statement of the factual background.

A chronological summary of the basic facts is contained in the opinion of the New York Court of Appeals (P. A. pp. 32-34). The non-payment of the taxes for which the property was sold and the validity of the tax sale up to the time of service of the notice to redeem have never been challenged by petitioners.

Catherine Laffey was the record owner of the property as shown on the County Clerk's records.[1] She had died in 1920, leaving the Laffey heirs and her estate was administered in 1920 in the Nassau County Surrogate's Court.[2] During the years 1944-1948, her husband, Thomas Laffey, received tax bills at the address 134 West 71st Street, New York, N. Y. as shown on the records of the County Treasurer and Receiver of Taxes.[3]

Sections 5-51.0, Nassau County Administrative Code, required notice to redeem to be sent to Catherine Laffey and to her heirs at law (P. A. pp. 21-25). Notice was sent to Catherine Laffey at 134 West 71st Street, New York, N. Y. and was returned.[4] The tax deed was issued by the County Treasurer on December 13, 1948[5] in accordance with Section 5-51.0 of the Code. By the terms of that section, the validity of the deed was not affected by the failure to serve notice to redeem on the Laffey heirs but their right to redeem the tax sale survived the delivery of the deed.[6]

The tax deed was recorded on January 17, 1949 and the summons, complaint and notice of pendency of the partition action, dated January 13, 1949, were filed and recorded

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[1] Exs. 1-2, fols. 593-594.
[2] Exs. 3-4, fols. 595-606.
[3] Exs. B, E, F, fols. 785-786; 793-804; see also fols. 207-216.
[4] Ex. O, fols. 926-927.
[5] Ex. H, fols. 808-810.
[6] Subd. g, Sec. 5-51.0, Nassau County Administrative Code (P. A. pp. 23-24).

in the Nassau County Clerk's Office on January 20, 1949.[7] Searches of the records of the County Clerk, Treasurer and Surrogate were made prior thereto and continued to the date of filing of partition action (310-316).* Both the Trial Court and the Court of Appeals found that extensive efforts were thereafter made by the plaintiff in the partition action to locate the Laffey heirs, without avail (999-1000; P. A. 33-34). The details and results of these efforts were presented to the County Court of Nassau County wherein the partition action was pending on March 28, 1949[8] and an order was entered pursuant to New York Civil Practice Act and Rules of Civil Practice directing that the summons be served upon the Laffey heirs by publication and that the mailing of the summons to them be dispensed with.[9]

After the institution of the partition action and the recording of the tax deed, the Laffey heirs purported to sell the property to Leighton and on February 15, 1949, Leighton executed and delivered a deed to petitioners.[10] The Laffeys did not appear in the partition action and judgment for the plaintiff barring the Laffeys of any interest in the property was granted on June 22, 1949.[11]

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[7] Ex. H, fols. 808-810; Exs. N-1, N-2, N-3, fols. 829-855.

[8] Ex. 18, fols. 652-720. In one affidavit the attorney for the plaintiff in the partition action stated: "Deponent has caused the records in the Office of The Clerk of The County of Nassau to be searched and found no record of any conveyance or instrument affecting the title to any of said parcels, made by any of the said defendants since the time they acquired title" (679).

[9] Ex. 18, fols. 652-720. The order recited: "* * * the Court being satisfied by the affidavits herein that the plaintiff does not know a place or places where the said defendants would probably receive matter transmitted through the Post Office" (fol. 661).

[10] Exs. 12, 14, fols. 617-633. The deeds were recorded in the Nassau County Clerk's Office on January 28, 1949 and February 26, 1949 respectively, and set forth the names and addresses of the parties thereto.

[11] Ex. N-9, fols. 904-920.

* References are to folio numbers in the printed record unless otherwise indicated.

Argument

A. The New York Court of Appeals did not hold the deed to be conclusively valid.

Petitioners were afforded every opportunity to challenge the sufficiency of the tax deed. No presumption, conclusive or otherwise, was urged or applied against their attack. The Laffey heirs were entitled to notice to redeem but the statute specifically provides for the effect of the failure to serve such notice.[12] The Court of Appeals correctly applied that statute and held that right of the Laffey heirs to redeem survived the deed but was subsequently barred by the partition judgment.[13]

No one has a vested right in a particular form of tax sale procedure.[14] A property owner is presumed to know that the local government is levying taxes and that, unless paid, the land will be sold to satisfy the amount due.[15] Here, the Laffey heirs knew that taxes were unpaid.[16] Notice of the tax sale itself was published as required by the Code.[17] A right of redemption is exclusively statutory, can only be exercised or decreed pursuant to the provisions of the statute and the absence of provision therefor does not violate due process.[18]

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[12] Sec. 5-51.0(g), P. A. pp. 23-24. That subdivision provides in part that the validity of the deed is not affected and impaired by failure to give notice but reserves the right of persons entitled to but who did not receive notice until the entry of judgment in an action under Section 5-57.1 of the Code.

[13] P. A. p. 37.

[14] League v. Texas, 184 U. S. 156.

[15] Devalan Home & Land Co. Inc. v. Erie County, 188 Misc. 299, aff'd 294 N. Y. 847.

[16] Ex. E-F, fols. 793-804. All tax bills (four of them) issued after the 1946 tax sale were stamped "arrears" and were received by Thomas Laffey (207-219; P. A. p. 33).

[17] Ex. J, fols. 812-813.

[18] Keely v. Sanders, 99 U. S. 441.

B. The partition action was effective to extinguish the outstanding right of the petitioners' predecessors to redeem.

The Code provides that any right to redeem which survives the delivery of the tax deed may be extinguished by an action to establish the regularity of the sale pursuant to the provisions of Section 5-57.1 of the Code.[19] The tax sale purchaser chose to cut off such right of redemption by the partition action. The New York Court of Appeals held that the action under Section 5-57.1 was not exclusive but permissive and that the partition action, or any other appropriate form of suit is sufficient to bar such right of redemption.[20] We submit such a holding was sound and presents no federal question.

Petitioners argue that a valid judgment in a partition action barring the right of the Laffey heirs to redeem amounts to a taking of property without due process, although, as to any other right extinguished by such judgment, no constitutional question would be presented. The argument has no substance. The property itself was sold by the County Treasurer in 1946[21] and was conveyed by the County Treasurer to the tax sale buyer in 1948.[22] The surviving right of redemption was not a property right but a gratuity provided in the statute.[23] An alleged erroneous decision by the Court of Appeals holding such right to redeem to have been barred by the partition judgment presents no federal question.

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[19] P. A. p. 24.

[20] P. A. pp. 37-38.

[21] Ex. K, fols. 814-815.

[22] Ex. 17, fols. 641-651.

[23] Keely v. Sanders, 99 U. S. 441.

C. The Proceedings for Service by Publication were proper.

Petitioners do not attack the statutory scheme of "Service by Publication" in partition and similar actions. Before such process may be availed of, the Court must be satisfied of the applicant's inability to effect personal service and, in cases where mailing is dispensed with, of plaintiff's inability to ascertain a place where mail would probably be received.[24] Indeed, the decisions of this Court clearly establish its validity.[25]

It is petitioners' contention that, in view of the particular facts here, the provisions of the order for publication which dispensed with the mailing of the summons to the Laffey heirs violated the due process clause of the Federal Constitution. Their argument is that there were at least three addresses, known or available to the plaintiff in the partition action to which the summons could or should have been mailed:

1. 134 West 71st Street, New York, N. Y.

This was the address shown on the tax rolls from 1946 to 1948 for Thomas Laffey.[26] Mail sent to Catherine Laffey at that address in September, 1948, had been returned marked "Moved."[27] The attempts to locate the Laffeys at that address revealed that they did not live there (694-701). These facts were submitted to the County Court and, predicated thereon, mailing was dispensed with.[28]

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[24] Sections 232, 232-a, 232-b, Civil Practice Act and Rule 50, Rules of Civil Practice (P. A. pp. 19-21).

[25] Grannis v. Ordean, 234 U. S. 385; Mullane v. Central Hanover Bank, 339 U. S. 306; City of New York v. New York N. H. & H. R. Co., 344 U. S. 293.

[26] Petition, p. 8.

[27] Ex. O, fols. 926-927.

[28] Ex. 18, fols. 652-720.

And that fact is that the Laffeys were not living there during 1949 when the service by publication was effected.[29] There is no evidence to support petitioners' statement nor is it a fact that "if they had mailed the summons to Thomas Laffey (at 134 West 71st Street, New York, N. Y.) it would have been received by him."[30]

2. *Care of Cadwalader, Wickersham & Taft.*

The basis of petitioners' contention in this regard is that the files of the Estate of Catherine Laffey, in the Surrogate's Court, which were examined by plaintiff in the partition action, indicated that this firm represented the Estate. That Estate was administered in 1920, almost thirty (30) years before the publication order.[31] This argument was specifically answered by the Court of Appeals.[32]

Petitioners' reference to the mailing of the summons to another defendant in care of her attorney, in the same action (Petition p. 9) was readily explained. There the attorney represented the defendant within two (2) years of the publication order and that attorney advised the plaintiff that he would appear for his client in the partition action (678-679).

3. *The addresses appearing in the deed recorded January 28, 1949, after the Partition Action was instituted.*

In her affidavit in support of the publication order dated March 28, 1949, plaintiff's attorney stated she had searched the County Clerk's records (679). Both the trial court and the Court of Appeals found that the search was made up to January 20, 1949, the date the notice of pendency of the partition action was filed, that this was the customary pro-

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[29] Ex. 12, fols. 618-619; Ex. 21, fol. 755.

[30] Petition, p. 8.

[31] Exs. 4-6, fols. 596-609.

[32] P. A. p. 35.

cedure in Nassau County, that the attorney had no knowledge of the existence of the subsequently recorded deed and that the affidavit was not untrue.[33]

Conclusion

This is not a case where the plaintiff knew of an address to which to mail the summons.[34] The constitutionality of substituted service proceedings should not depend upon hindsight but, rather, upon proof of reasonable efforts to the satisfaction of the judicial officer to whom the publication order is submitted. Here, the parties sought could not be located and the County Court so found. The truthfulness of the affidavits, the extent and reasonableness of the efforts have been approved by all the New York Courts. In the *Mullane* Case, this Court stated (p. 318):

> "Accordingly, we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interest or addresses are unknown to the Trustee."

We submit that petitioners have failed to establish the existence of any substantial federal questions and that the *writ of certiorari* should be denied.

Respectfully submitted,

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Dated: February 1, 1954.

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[33] Opinion of Trial Court, fols. 997-1002; Opinion of Court of Appeals, P. A. pp. 34-35.

[34] Mullane v. Central Hanover Bank, 339 U. S. 306; City of New York v. New York N. H. & H. R. Co., 344 U. S. 293.